

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 10, 1989 appellant, then a 35-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on May 9, 1989 he sustained a left knee injury when pulling an all-purpose container (APC) while in the performance of duty. He did not stop work but was granted disability retirement on March 11, 1992. OWCP accepted that appellant sustained a sprain/strain of the left knee and leg, a tear of the left lateral meniscus, and left corns/calluses. It authorized arthroscopic surgery on the left knee, performed on January 23, 1990.<sup>3</sup>

On April 15, 2005 appellant filed a notice of recurrence of disability (Form CA-2a), alleging that he experienced pain and weakness in his left knee commencing October 30, 2004, causally related to the accepted May 10, 1989 employment injury.

By decision dated August 16, 2006, OWCP denied appellant's recurrence of disability claim, finding that the evidence of record was insufficient to establish that appellant sustained a recurrence of disability commencing October 30, 2004 causally related to his work injury of May 9, 1989.

On November 28, 2006 appellant appealed to the Board.<sup>4</sup> By decision dated June 7, 2007, the Board affirmed the August 16, 2006 OWCP decision.

OWCP received additional evidence. Appellant subsequently submitted employing establishment medical records dated March 4, 1977 through June 7, 1988 where he was treated for several conditions including ankle, toe, right foot, and back pain. He was treated by Dr. Michael Redlich, a Board-certified neurologist, on February 25, 1992 for cervical and thoracic disc syndrome. Likewise, from March 12, 1993 through August 11, 2000, Dr. A. Janati, a Board-certified neurologist, treated appellant for chronic neck and left lower extremity pain. He diagnosed degenerative arthritis of the cervical and thoracic spine, which was related to trauma while in the military in 1978. Appellant attended physical therapy from July 17, 1978 through March 16, 2000. He also submitted a position description for a personnel clerk.

Dr. Azer treated appellant from October 20, 1989 through September 10, 1991 for callouses on his left foot and left knee pain. OWCP received diagnostic studies from March 3, 1992 through December 21, 2017.

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<sup>2</sup> Docket No. 07-406 (issued June 7, 2007).

<sup>3</sup> On January 23, 1990 Dr. Samir N. Azer, a Board-certified orthopedist, performed arthroscopy of the left knee, removed loose chondral fracture, shaved crater, and diagnosed loose chondral body of the left knee with greater defect of the left medial femoral condyle weight bearing surface.

<sup>4</sup> *Supra* note 2.

On January 21, 2017 Dr. Ferdinand M. Amante, Jr., an orthopedic surgeon, reevaluated appellant for a painful left knee. Appellant reported sustaining a proximal left leg fracture at 14 years old and underwent a left knee meniscectomy in 1990. He diagnosed osteoarthritis of the left knee and left leg length discrepancy which could be an aggravating factor for osteoarthritis.

In a statement dated September 13, 2018, appellant provided a history of his employment with the Federal Government. He sought to expand the acceptance of his claim to include aggravated underlying preexisting medical conditions. In a statement dated December 13, 2018, appellant again requested expansion of his claim.

In a medical certificate and report dated November 20, 2018, Dr. Emiliano B. Tablante, a Board-certified orthopedist, noted a history of the May 9, 1989 work injury and provided a medical history from May 1967 through January 2, 2018. He noted that appellant underwent a posterior decompression L3-4 and L4-5 on January 2, 2018. Dr. Tablante noted findings on examination of decreased stride length, tight on trapezius, paracervical and lats doris, muscle spasm of lower trapezius, intermittent localized pain of the knee and patella, muscle spasm with dull pain in the feet and hand, and cervical pain with radiculopathy. He diagnosed left ganglion cyst of first metatarsal head, focal right synovitis, posterior calcaneal spur, left os peroneum, right pes planus, overpronation of the foot, osteoarthritis changes of the knees, left patella osteophyte, right knee varus, status post chronic low back pain with radiculopathy, levoscoliosis, compression deformity of the thoracic spine, thoracic spondylosis, cervical spondylosis with radiculopathy at C4-5, C5-6, C6-7, mild anterior wedge compression deformities at C5-6, and bilateral carpal tunnel syndrome. Dr. Tablante opined within a reasonable degree of medical certainty that the above medical conditions were consequential to the accepted left knee and leg sprain/strain, left lateral meniscus tear, and left calluses. He recommended further diagnostic work up including epidural cervical injections and diagnostic arthroscopy of the left knee.

On May 30, 2019 appellant again requested his claim be reopened and expanded to include additional conditions.

On September 28, 2020 appellant requested reconsideration of the August 16, 2006 OWCP decision denying his recurrence claim. He alleged clear evidence of error in the last OWCP decision based on OWCP's failure to develop his subsequent injury claims after the January 25, 1990 OWCP-authorize arthroscopic left knee surgery revealed loose chondral bodies and defect of the medial femoral condyle. Appellant also requested a schedule award for the left lower extremity, and expansion of the acceptance of his claim.

On September 28, 2020 OWCP received an electromyogram (EMG) and nerve conduction velocity (NCV) study dated September 18, 2003 that revealed multiple peripheral neuropathy, sensorimotor affecting the lower more than upper extremities without ruling out bilateral chronic cervical C5-6 radiculopathies and bilateral lumbar L5 radiculopathies. X-rays of the feet dated October 3, 2017 revealed posterior calcaneal spurs and os peroneum of the left foot. An x-ray of the right hip dated November 24, 2019 revealed no discrete fracture or dislocation. An x-ray of both knees dated March 10, 2020 revealed mild degenerative osteoarthritic changes and bilateral patellar enthesophytes.

On October 9, 2020 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a development letter dated October 20, 2020, OWCP requested that appellant submit an impairment evaluation addressing whether he had reached MMI and provide an impairment rating using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>5</sup> It afforded him 30 days to submit additional medical evidence in support of his schedule award claim.

By decision dated December 21, 2020, OWCP denied appellant's reconsideration request of the August 16, 2006 recurrence decision, finding that it was untimely filed and failed to demonstrate clear evidence of error.

By decision dated April 15, 2021, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

### **LEGAL PRECEDENT -- ISSUE 1**

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>6</sup> This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>7</sup> Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).<sup>8</sup> Imposition of this one-year filing limitation does not constitute an abuse of discretion.<sup>9</sup>

OWCP may not deny a request for reconsideration solely because the application was not timely filed. When a request for reconsideration is untimely, it undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.<sup>10</sup> OWCP's procedures provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.<sup>11</sup>

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<sup>5</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>6</sup> 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

<sup>7</sup> 20 C.F.R. § 10.607(a).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (September 2020).

<sup>9</sup> *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>10</sup> See 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>11</sup> *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). See also *id.* at § 10.607(b); *supra* note 8 at Chapter 2.1602.5 (September 2020).

In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>12</sup>

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>13</sup> The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision. The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>14</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

OWCP's regulations<sup>15</sup> and procedures<sup>16</sup> establish a one-year time limit for requesting reconsideration, which begins on the date of the last merit decision issued in the case. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including a merit decision of the Board.<sup>17</sup> The most recent merit decision on the recurrence issue was the Board's June 7, 2007 decision, which affirmed the denial of appellant's claim for a recurrence of disability on October 30, 2004. As OWCP received his request for reconsideration on September 28, 2020, more than one year after the June 7, 2007 decision, the Board finds that it was untimely filed. Because appellant's request was untimely filed, he must demonstrate clear evidence of error on the part of OWCP in its August 16, 2006 decision.

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<sup>12</sup> *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>13</sup> *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 8 at Chapter 2.1602.5(a) (September 2020).

<sup>14</sup> *U.C.*, Docket No. 19-1753 (issued June 10, 2020).

<sup>15</sup> 20 C.F.R. § 10.607(a); *see F.N.*, Docket No. 18-1543 (issued March 6, 2019); *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>16</sup> *Supra* note 8 at Chapter 2.1602.4 (September 2020); *see L.A.*, Docket No. 19-0471 (issued October 29, 2019); *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>17</sup> 20 C.F.R. § 10.607(b); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a. (September 2020); *R.G.*, Docket No. 21-0540 (issued November 9, 2021); *B.P.*, Docket No. 20-0178 (issued August 23, 2021); *Debra McDavid*, 57 ECAB 149 (2005).

Appellant submitted employing establishment medical records dated March 4, 1977 through June 7, 1988; treatment notes from Dr. Redlich dated February 25, 1992; reports from Dr. Janati dated March 12, 1993 through August 11, 2000; physical therapy treatment notes from July 17, 1978 through March 16, 2000; and reports from Dr. Azer dated October 20, 1989 through September 10, 1991. These reports are not relevant to the recurrence claim as they predate the alleged date of the recurrence and do not raise a substantial question as to whether the August 16, 2006 decision was in error.<sup>18</sup>

Appellant submitted diagnostic studies dated March 3, 1992 through March 10, 2020 including x-rays, MRI scans, and an EMG/NCV study. Diagnostic studies, standing alone, lack probative value on the issue of causal relationship.<sup>19</sup> Therefore, none of this evidence manifests on its face that OWCP committed an error in denying appellant's claim for recurrence of disability commencing October 30, 2004. Thus, the evidence is insufficient to demonstrate clear evidence of error.<sup>20</sup>

Appellant also submitted a January 21, 2017 report from Dr. Amante who diagnosed osteoarthritis of the left knee and left leg length discrepancy, which could be an aggravating factor for osteoarthritis. Similarly, in a medical certificate and report dated November 20, 2018, Dr. Tablante provided additional nonaccepted diagnoses and opined within a reasonable degree of medical certainty the mentioned diagnoses were consequential to the accepted left knee and leg sprain/strain, left lateral meniscus tear, and left calluses. However, these reports do not address the claimed recurrence of disability commencing October 30, 2004. Thus, this evidence does not raise a substantial question as to the correctness of OWCP's August 16, 2006 merit decision.<sup>21</sup>

As appellant has not raised an argument or submitted any evidence that manifests on its face that OWCP committed an error in denying his recurrence claim, the Board finds that his untimely request for reconsideration failed to demonstrate clear evidence of error.<sup>22</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

The schedule award provisions of FECA,<sup>23</sup> and its implementing federal regulations,<sup>24</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For

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<sup>18</sup> *M.P.*, Docket No. 17-0367 (issued March 12, 2018); *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>19</sup> *See P.A.*, Docket No. 18-0559 (issued January 29, 2020); *A.P.*, Docket No. 18-1690 (issued December 12, 2019); *R.M.*, Docket No. 18-0976 (issued January 3, 2019).

<sup>20</sup> *J.C.*, Docket No. 20-1250 (issued May 24, 2021); *W.D.*, Docket No. 19-0062 (issued April 15, 2019).

<sup>21</sup> *T.C.*, Docket No. 19-1709 (issued June 5, 2020); *B.W.*, Docket No. 19-0626 (issued March 4, 2020).

<sup>22</sup> *Id.*

<sup>23</sup> 5 U.S.C. § 8107.

<sup>24</sup> 20 C.F.R. § 10.404.

consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>25</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>26</sup>

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of an employment injury.<sup>27</sup> OWCP's procedures provide that, to support a schedule award, the file must contain competent medical evidence, which shows that the impairment has reached a permanent and fixed state and indicates that the date on which this occurred (date of MMI), describes the impairment in sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.<sup>28</sup> Its procedures further provide that, if a claimant has not submitted a permanent impairment evaluation, it should request a detailed report that includes a discussion of how the impairment rating was calculated.<sup>29</sup> If the claimant does not provide an impairment evaluation and there is no indication of permanent impairment in the medical evidence of file, the claims examiner may proceed with a formal denial of the award.<sup>30</sup>

The claimant has the burden of proof to establish that the condition for which a schedule award is sought is causally related to his or her employment.<sup>31</sup> OWCP procedures, however, further provide that if a claimant does not provide an impairment evaluation from his or her physician when requested, and there is an indication of permanent impairment in the medical evidence of file, the claims examiner (CE) should refer the claimant for a second opinion evaluation. The CE may also refer the case to the DMA prior to scheduling a second opinion examination to determine if the evidence in the file is sufficient for the DMA to provide an impairment rating. If the case is referred for a second opinion, the report should contain the information described in 6a above.<sup>32</sup> If it does not contain this information, clarification with the second opinion should be sought.<sup>33</sup>

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<sup>25</sup> *Id.* at § 10.404(a).

<sup>26</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>27</sup> *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

<sup>28</sup> *Supra* note 8 at Chapter 2.808.5 (March 2017).

<sup>29</sup> *Id.* at Chapter 2.808.6(a) (March 2017).

<sup>30</sup> *Id.* at Chapter 2.808.6(c).

<sup>31</sup> *Id.*

<sup>32</sup> Chapter 2.808.6a(1) provides that the medical evidence should include a detailed history of clinical presentation, physical findings, functional history, clinical studies or objective tests, analysis of findings, and the appropriate impairment based on the most significant diagnosis, as well as a discussion of how the impairment rating was calculated. *Supra* note 8 at Chapter 2.808.6a.

<sup>33</sup> *Supra* note 8 at Chapter 2.808.6d (March 2017).

## ANALYSIS -- ISSUE 2

The Board finds that appellant has not met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

OWCP accepted the claim for sprain/strain of the left knee and leg, a tear of the left lateral meniscus, left corns/calluses, and aggravation of other spondylosis with radiculopathy, lumbosacral region. On October 9, 2020 appellant filed a claim for a schedule award. Under FECA,<sup>34</sup> where a claimant is seeking a schedule award, he or she must submit a medical report that “must contain accurate measurements of the function of the organ or member, in accordance with the A.M.A., *Guides*.”<sup>35</sup> The burden is on the claimant to provide this evidence.<sup>36</sup>

In support of his claim, appellant submitted a November 20, 2018 report by Dr. Tablante. However, the Board finds that it is of diminished probative value because he neither utilized the sixth edition of the A.M.A., *Guides*, nor found that appellant reached MMI. Therefore, Dr. Tablante’s report is insufficient to establish permanent impairment of a scheduled member or function of the body causally related to appellant’s accepted employment condition.<sup>37</sup>

The remaining medical evidence submitted by appellant is also insufficient to establish permanent impairment of a scheduled member or function of the body causally related to appellant’s accepted employment condition as it also does not conform with the protocols of the A.M.A., *Guides*.

Accordingly, the Board finds that appellant has not met his burden of proof.

Appellant may request a schedule award, or increased schedule award, at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased permanent impairment.

## CONCLUSION

The Board finds that OWCP properly denied appellant’s request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. The Board further finds that appellant has not met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

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<sup>34</sup> *Supra* note 1.

<sup>35</sup> 20 C.F.R. § 10.333.

<sup>36</sup> *Id.* at § 10.115.

<sup>37</sup> *See M.G.*, Docket No. 19-0823 (issued September 17, 2019).



**ORDER**

**IT IS HEREBY ORDERED THAT** the April 15, 2021 and December 21, 2020 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 2, 2022  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board